

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 20, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JULIE C.,

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

No. 1:21-CV-3138-JAG

ORDER GRANTING
PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT
IN PART

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF Nos. 11 and 12. Attorney D. James Tree represents Plaintiff; Special Assistant United States Attorney Edmund Darcher represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 16. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment, in part, and **DENIES** Defendant's Motion for Summary Judgment.

I. JURISDICTION

Plaintiff filed applications for Disability Insurance Benefits and Supplemental Security Income on August 15, 2019, alleging disability since July 1, 2019, due to depression, anxiety, and cancer in remission/immune system compromised. Tr. 26, 75. Plaintiff also filed an application for disabled widow's benefits on September 17, 2019. Plaintiff's claim was denied initially and on

ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT - 1

1 reconsideration, and she requested a hearing before an administrative law judge
2 [ALJ]. Tr. 26. A telephonic hearing was held on December 14, 2020, at which
3 vocational expert Larry Underwood and Plaintiff, who was represented by counsel,
4 testified. Tr. 26. ALJ Elizabeth Ebner presided. Tr. 38. The ALJ denied benefits
5 on December 22, 2020. Tr. 23. The Appeals Council denied review. Tr. 1. The
6 ALJ's decision became the final decision of the Commissioner, which is
7 appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this
8 action for judicial review on October 22, 2021. ECF No. 1.

9 II. STATEMENT OF FACTS

10 The facts of the case are set forth in detail in the transcript of proceedings
11 and are briefly summarized here. At the time of the alleged onset, Plaintiff was 56
12 years old. She graduated from high school and completed two years of college.
13 Plaintiff's past jobs included being a receptionist, fitness instructor, and mock
14 military role player. TR. 317. She experienced a series of deaths in the family and
15 resides alone. Tr. 55, 64. Plaintiff has a driver's license, but mostly stays home
16 and cares for herself. Tr. 56, 61-62, 66.

17 III. STANDARD OF REVIEW

18 The ALJ is responsible for determining credibility, resolving conflicts in
19 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
20 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
21 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
22 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
23 only if it is not supported by substantial evidence or if it is based on legal error.
24 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
25 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
26 1098. Put another way, substantial evidence is such relevant evidence as a
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1 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
2 *Perales*, 402 U.S. 389, 401 (1971).

3 If the evidence is susceptible to more than one rational interpretation, the
4 Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at
5 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir.
6 1999). If substantial evidence supports the administrative findings, or if
7 conflicting evidence supports a finding of either disability or non-disability, the
8 ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230
9 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be
10 set aside if the proper legal standards were not applied in weighing the evidence
11 and making the decision. *Browner v. Secretary of Health and Human Services*,
12 839 F.2d 432, 433 (9th Cir. 1988).

13 IV. SEQUENTIAL EVALUATION PROCESS

14 The Commissioner has established a five-step sequential evaluation process
15 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
16 416.920(a); see *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
17 through four, the burden of proof rests upon the claimant to establish a prima facie
18 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This
19 burden is met once a claimant establishes that a physical or mental impairment
20 prevents him from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
21 416.920(a)(4). If a claimant cannot do his past relevant work, the ALJ proceeds to
22 step five, and the burden shifts to the Commissioner to show that: (1) the claimant
23 can make an adjustment to other work; and (2) the claimant can perform specific
24 jobs that exist in the national economy. *Batson v. Comm'r of Soc. Sec. Admin.*,
25 359 F.3d 1190, 1193-94 (9th Cir. 2004). If a claimant cannot make an adjustment
26 to other work in the national economy, the claimant will be found disabled. 20
27 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).
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V. ADMINISTRATIVE FINDINGS

On December 22, 2020, the ALJ issued a decision finding that Plaintiff was not disabled as defined in the Social Security Act.

At *step one*, the ALJ found that Plaintiff had not engaged in substantial gainful activity since July 1, 2019. Tr. 29.

At *step two*, the ALJ found Plaintiff had the severe impairments of depression with anxious presentation, post-traumatic stress disorder, and substance addiction disorder. Tr. 29.

At *step three*, the ALJ determined that Plaintiff does not have an impairment or combination of impairments that meets or medically equal one of the listed impairments in 20 C.F.R., Subpart P, Appendix 1 (20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925 and 416.926). Tr. 30.

The ALJ also found that Plaintiff has the residual functional capacity [RFC] to perform a full range of work at all exertional levels, but with the following non-exertional limitations:

[S]he can perform simple, routine tasks with occasional changes in the work setting. She can have occasional interaction with supervisors, coworkers, and the public. She will be off task 5 percent of the time.

Tr 31.

At *step four*, the ALJ found that Plaintiff could not perform past relevant work as a physical instructor. Tr. 36.

At *step five*, the ALJ found that, based on the testimony of the vocational expert, and considering Plaintiff's age, education, work experience, and RFC, Plaintiff was capable of performing jobs that existed in significant numbers in the national economy, including the jobs of salvage laborer, laboratory equipment cleaner, and day worker. Tr. 37.

1 The ALJ thus concluded Plaintiff was not under a disability within the
2 meaning of the Social Security Act at any time from the alleged onset date through
3 the date of the decision. Tr. 38.

4 VI. ISSUES

5 The question presented is whether substantial evidence exists to support the
6 ALJ's decision denying benefits and, if so, whether that decision is based on proper
7 legal standards.

8 Plaintiff contends that the ALJ erred by (1) improperly rejecting Plaintiff's
9 symptom testimony, and (2) improperly evaluating the medical opinion evidence.
10 ECF No. 11. Defendant argues that the ALJ reasonably found that subjective and
11 objective evidence of symptom management, in addition to Plaintiff's activities,
12 undermined Plaintiff's symptom testimony and that the ALJ applied the proper
13 standard and reasonably evaluated medical opinion evidence. ECF No. 12.

14 VII. DISCUSSION

15 A. Plaintiff's Subjective Statements.

16 Plaintiff contends the ALJ erred by improperly rejecting her subjective
17 complaints. ECF No. 11. It is the province of the ALJ to assess subjective
18 complaints. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's
19 findings, however, must be supported by specific, cogent reasons. *Rashad v.*
20 *Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant produces
21 medical evidence of an underlying medical impairment, the ALJ may not discredit
22 testimony as to the severity of an impairment merely because the objective
23 evidence fails to fully corroborate the degree of pain alleged. *Reddick v. Chater*,
24 157 F.3d 715, 722 (9th Cir. 1998). Absent affirmative evidence of malingering,
25 the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear
26 and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v.*
27 *Chater*, 81 F.3d 821, 834 (9th Cir. 1996). "General findings are insufficient:
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1 rather the ALJ must identify what testimony is not credible and what evidence
2 undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*,
3 12 F.3d 915, 918 (9th Cir. 1993).

4 The ALJ found that Plaintiff's statements concerning intensity, persistence,
5 the limiting effects of Plaintiff's symptoms were not entirely consistent with the
6 medical evidence and other evidence in the record because the longitudinal record
7 shows that Plaintiff's symptoms are managed.

8 The Court finds that the ALJ properly cited specific, clear and convincing
9 reasons for rejecting parts of the Plaintiff's testimony and overall, the ALJ's
10 assessment of the Plaintiff's subjective complaints were supported by substantial
11 evidence. Evidence of medical treatment successfully relieving symptoms can
12 undermine a claim of disability. *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th
13 Cir. 2017). An ALJ may also consider a claimant's reports to her providers and
14 whether they are consistent with her allegations. *Tonapetyan v. Halter*, 242 F.3d
15 1144, 1148 (9th Cir. 2001). An ALJ may also reasonably question a claimant's
16 allegations if they are inconsistent with her demonstrated activities. *Orn v. Astrue*,
17 495 F.3d 625, 639 (9th Cir. 2007). The ALJ examined the record over time noting
18 that in early exams, Plaintiff exhibited a dysphoric mood and acknowledged
19 suicidal ideations, Tr. 32 – 33, but that beginning in early 2020, Plaintiff
20 acknowledged improvement in her symptoms which continued to be reflected in
21 the record throughout early to mid-2020, reflecting successful treatment through
22 medication. Tr. 34 - 35. In addition to a thorough review of Plaintiff's medical
23 record, the ALJ also reasonably found that Plaintiff's daily activities undermined
24 her reports of the severity of her symptoms, citing many examples of activities,
25 such as caring for a friend following surgery. Tr. 35.
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1 **B. Medical Opinion Evidence.**

2 Plaintiff argues that the ALJ improperly evaluated medical opinion evidence
3 from Elizabeth Scott, FNP, Tasmyn Bowes, Psy.D., and Jenifer Schultz, Ph.D. For
4 claims filed on or after March 27, 2017 the ALJ considers the persuasiveness of
5 each medical opinion and prior administrative medical finding, regardless of
6 whether the medical source is an Acceptable Medical Source. 20 C.F.R. §
7 404.1520c(c). The ALJ is required to consider multiple factors, including
8 supportability, consistency, the source's relationship with the claimant, any
9 specialization of the source, and other factors (such as the source's familiarity with
10 other evidence in the file or an understanding of Social Security's disability
11 program). *Id.* The regulations make clear that the supportability and consistency
12 of the opinion are the most important factors, and the ALJ must articulate how they
13 considered those factors in determining the persuasiveness of each medical opinion
14 or prior administrative medical finding. 20 C.F.R. § 404.1520c(b). The ALJ may
15 explain how they considered the other factors, but is not required to do so, except
16 in cases where two or more opinions are equally well-supported and consistent
17 with the record. *Id.*

18 Supportability and consistency are further explained in the regulations:

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20 (1) *Supportability*. The more relevant the objective medical
21 evidence and supporting explanations presented by a medical
22 source are to support his or her medical opinion(s) or prior
23 administrative medical finding(s), the more persuasive the
24 medical opinions or prior administrative medical finding(s) will
25 be.

26 (2) *Consistency*. The more consistent a medical opinion(s) or
27 prior administrative medical finding(s) is with the evidence from
28 other medical sources and nonmedical sources in the claim, the
more persuasive the medical opinion(s) or prior administrative
medical finding(s) will be.

1 20 C.F.R. § 404.1520c(c).

2 The Ninth Circuit has additionally held that the new regulatory framework
3 displaces the longstanding case law requiring an ALJ to provide “specific and
4 legitimate” or “clear and convincing” reasons for rejecting a treating or examining
5 doctor’s opinion. *Woods v. Kijakazi*, 32 F.4th 785 (9th Cir. 2022). “Now, an
6 ALJ’s decision, including the decision to discredit any medical opinion, must
7 simply be supported by substantial evidence.” *Id.*, at 787.

8 **1. Elizabeth Scott, FNP and Tasmyn Bowes, Psy.D.**

9 Plaintiff complains that the ALJ erred by: (1) improperly conflating two
10 separate opinions, (2) improperly crediting less weight to the opinions because the
11 evaluations took place prior to the alleged onset date, (3) inaccurately concluding
12 that the physical limitations exceeded the evaluator’s expertise, and (4) erroneously
13 concluding that the evaluator lacked support for their opinions. Defendant
14 responds that the ALJ’s collective analysis of the two opinions amounts to harmless
15 error because the ALJ adopted RFC limitations consistent with both Elizabeth
16 Scott and Tasmyn Bowes’ opinions. Defendant further argues that each of the
17 other three bases cited by the Plaintiff are insufficient to disturb the ALJ’s findings.
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19 The Ninth Circuit defines harmless error as such error that is
20 “inconsequential to the ultimate nondisability determination.” *Stout v.*
21 *Commissioner, Social Security Administration*, 454 F.3d 1050, 1055 (9th Cir.
22 2006). The Court finds that ALJ erred in performing a collective analysis on the
23 two separate medical opinions by Elizabeth Scott and Dr. Bowes. The ALJ’s
24 conflation of the two opinions makes it difficult to parse the rationale attributing
25 weight to the specific limitations. The Court cannot conclude that the RFC
26 limitations encompass restrictions opined by Dr. Bowes such as significant
27 limitations in ability to perform activities within a schedule, adapt to changes in the
28 workplace, learn new tasks, complete a normal workday and work week without

1 interruptions, and set realistic goals and plan independently. Further, the
2 justifications for crediting less weight to the restrictions do not appear to apply
3 equally to both clinicians. While both exams took place prior to the onset date, Dr.
4 Bowes did not opine as to physical limitations and did provide support for the
5 checkbox limitations. Consequently, the error is not harmless and requires remand
6 to allow the ALJ to conduct an independent review of each of the providers
7 accounting for the restrictions and time limitations addressed in each their opinions
8 separately.

9 **2. Jenifer Schultz, Ph.D.**

10 Plaintiff argues that the ALJ's conclusion that Dr. Shultz's opinion was only
11 partially persuasive improperly rested on the inconsistency between Dr. Shultz's
12 opinions and Plaintiff's daily activities. Defendant responds that the ALJ properly
13 weighted Dr. Shultz's opinion to the extent that the examination findings and
14 Plaintiff's daily activities supported the opinion

15 The ALJ noted that Dr. Shultz opined that despite fair social adaptation,
16 Plaintiff's daily living and occupational adaption was poor. Dr. Shultz, however,
17 failed to provide support for this opinion. The ALJ noted that Plaintiff
18 successfully managed daily living activities and she was independent in her
19 personal care. Given the contradiction between Plaintiff's daily living activities
20 and Dr. Shultz's opinion, the ALJ found that Dr. Shultz's conclusion regarding
21 Plaintiff's poor occupational adaption also lacked support in the record was likely
22 similarly faulty so gave that opinion little weight.

24 The Court finds that the ALJ did not err. While the ALJ's inference was not
25 the only possible conclusion, the ALJ made a reasonable conclusion based on the
26 record supported by substantial evidence. On remand, however, the ALJ shall
27 reconsider all opinions while reassessing the claim.

VIII. CONCLUSION

Having reviewed the record and the ALJ's findings, the Court concludes the ALJ's decision is not supported by substantial evidence. Plaintiff argues the decision should be reversed and remanded for the payment of benefits. The Court has the discretion to remand the case for additional evidence and findings or to award benefits. *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). The Court may award benefits if the record is fully developed, and further administrative proceedings would serve no useful purpose. *Id.* Remand is appropriate when additional administrative proceedings could remedy defects. *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this case, the Court finds that additional administrative proceedings could remedy defects. Further development of the record is necessary for a proper determination to be made.

The ALJ's decision with respect to weighing some of the opinion evidence relied on legal error. On remand, the ALJ shall reevaluate the medical opinions and the record as a whole and complete the five-step process. The Court makes no judgment as to the whether the record supports an award of benefits.

Accordingly, **IT IS ORDERED:**

1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **GRANTED, in part.**

2. Defendant's Motion for Summary Judgment, **ECF No. 12**, is **DENIED.**

3. The case is **REMANDED** to the Commissioner for further proceedings consistent with this opinion.

4. An application for attorney fees may be filed by separate motion.

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1 5. The District Court Executive is directed to file this Order and provide
2 a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for
3 **Plaintiff** and the file shall be **CLOSED**.

4 **IT IS SO ORDERED.**

5 DATED March 20, 2023.



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JAMES A. GOETKE
UNITED STATES MAGISTRATE JUDGE

The signature of James A. Goetze is written in blue ink above a horizontal line. Below the line, the name "JAMES A. GOETKE" and the title "UNITED STATES MAGISTRATE JUDGE" are printed in black capital letters.